BEAR CREEK HYDRO (ON RECONSIDERATION)

Decided October 27, 1992

Petition for reconsideration of a decision affirming the adjustment of a rental rate for a right-of-way for a hydroelectric power plant. CA-15574.

Board decision set aside in part; BLM decision set aside and remanded.

1. Appraisals -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Generally -- Rights-of-Way: Appraisals -- Rights-of-Way: Conditions and Limitations -- Rights-of-Way: Federal Land Policy and Management Act of 1976

> A rental rate adjustment for a right-of-way for a hydroelectric power plant under 43 CFR 2803.1-2 will be set aside and remanded so that the Bureau of Land Management Manual may apply policies and procedures that are being developed for determining rentals for such rights-of-way.

Bear Creek Hydro, 122 IBLA 200 (1992), set aside in part.

APPEARANCES: Stephen E. Champagne, Esq., Portland, Maine, for appellant; State Director, California State Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Bear Creek Hydro (Bear Creek) has filed a petition for reconsideration of our February 10, 1992, decision, Bear Creek Hydro, 122 IBLA 200 (1992). In that decision we determined that the provisions of the right-of-way granted Bear Creek for a hydroelectric power plant under Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1988), did not obligate the Bureau of Land Management (BLM) to grant Bear Creek a permanent right-of-way and waive rental charges in exchange for a reciprocal right-of-way from Bear Creek. Bear Creek Hydro, supra at 207. We then held that Bear Creek had "not shown any defects in BLM's appraisal methodology or demonstrated the rental is excessive" and affirmed BLM's February 21, 1989, decision adjusting the rental rate for the right-of-way. Id. at 208.

Bear Creek argues that BLM, when adjusting the rental rate for this right-of-way, was required to follow the fee schedule in 43 CFR 2803.1-2(c)(1)(i) (Memorandum in Support of Petition for Reconsideration at 5-7). In the alternative, Bear Creek "steadfastly maintains * * * that the BLM committed itself to enter into the reciprocal right-of-way agreement in issuing the Grant." Id. at 7-8. BLM responds that the fee schedule applies "to linear right-of-way grant(s)" and cannot be applied to a power plant site. (BLM Answer at 1). BLM also argues that "the grantee's agreement to provide an equivalent right-of-way to BLM is properly viewed as a condition BLM placed on issuance of the Federal right-of-way grant to the grantee." Id. at 2.

We agree that adjustment of the rental for this right-of-way should be determined in accordance with 43 CFR 2803.1-2. This regulation was in effect when BLM readjusted the rental in 1989; therefore, administration and assessment of rental of the right-of-way granted in 1984 is properly subject to the regulation current in 1989. Jack C. Gutte, 123 IBLA 295 (1992); Oregon Broadcasting Co., 119 IBLA 241 (1991); see Western Nuclear, Inc., 117 IBLA 281 (1991); Jesse H. Johnson, 112 IBLA 369 (1990).

However, Bear Creek is mistaken in arguing that BLM is required to follow the fee schedule in 43 CFR 2803.1-2(c)(1)(i) rather than make an appraisal as the basis for determining the right-of-way rental. The schedule applies to linear rights-of-way. 43 CFR 2803.1-2(c)(3)(i) applies to rental for non-linear rights-of-way:

> The rental * * * for non-linear right-of-way grants * * * (e.g., communication sites, reservoir sites, plant sites and storage sites) shall be determined by the authorized officer and * * * shall be based on either a market survey of comparable rentals, or on a value determination for specific parcels or groups of parcels. * * * All such rental determinations shall be prepared to the standards and format described in the Uniform Appraisal Standards for Federal Land Acquisition (Department of Justice publication) and/or in certain cases as required by the Bureau's Appraisal manual (9300). 1/

Although Bear Creek's right-of-way consists of two linear segments and one site, it is properly regarded as a non-linear right-of-way:

> The distinction between a linear and nonlinear right-of-way designation rests on the principle [sic] purpose of the individually

1/ The first quoted sentence of this rule omits language providing a third basis for determining rentals that was in the proposed rule, namely, "or on an application of the rental from the schedule provided in this paragraph where appropriate." See 51 FR 31886, 31892 (Sept. 5, 1986). The second quoted sentence was added to the rule in the final rulemaking in response to a comment on the proposed rules. See 52 FR 25811, 25815-16 (July 8, 1987).

> serialized grant. A right-of-way grant is nonlinear if the specifically authorized activity requires the use and occupancy of a site, station, location, tract, etc. as opposed to a route, corridor, or path.

BLM Manual § 2801.41 E. 3. a. (Release 2-263, Mar. 9, 1989). "Only one method of rental determination is appropriate for each grant. It is inappropriate to use the rental schedule for part of a R/W and an appraisal for another part." Id. § 2801.41 E. 4. b. (4).

BLM's February 21, 1989, decision states:

> The rental has been reviewed in accordance with 43 CFR 2803.1-2. The previous rental rate was $ 25.00 for a five-year period, subject to adjustment. In accordance with current regulations and our recent fair market rental appraisal of mini-hydro projects * * * the actual rental amount charged will be the difference, if any, between the amount the Federal Energy Regulatory Commission (FERC) charges as a land use fee and the royalty due on 4% of gross income from power production for the previous year.
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> The holder shall submit a report stating gross income of power production and land use fees paid to FERC, and pay the difference of the 4% royalty on gross power production and the FERC land use fees * * *.

As noted in our decision, 122 IBLA at 207, BLM's decision was prompted by Instruction Memorandum (IM) No. CA-89-06, issued by the Director, California State Office, BLM on October 7, 1988. The IM provides:

> 1. In the appraisal of mini-hydro projects, the lineal improvements located on public lands, including penstocks, diversion canals, distribution lines, etc., which lead to or from the power plant will be appraised as linear rights of way in accordance with the fee schedule contained in 43 CFR 2803.1-2(c)(1)(i). The actual rental amount charged on these lineal rights-of-way will be the difference, if any, between the amount the Federal Energy Regulatory Commission charges as a land use fee and the amount derived from BLM's fee schedule. * * *
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> 2. No rental charges will be assessed for any improvements, including power plants which are situated on private property.
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> 3. Market evidence discovered by the Appraisal Staff indicates that if the power plant is situated on BLM land, a nominal basic site rental of $ 100 will be assessed until the power plant in on line (in production). * * * After the power plant begins production, the market evidence indicates that a 4 percent royalty fee shall be assessed, based on gross income of the production of power, and the nominal base rental shall be dropped.

Both the October 7, 1988, IM and BLM's February 21, 1989, decision were issued before the March 8, 1989, BLM Manual release quoted above and it is apparent that they are inconsistent with the approach adopted by the Manual. So, too, is the State Appraiser's September 30, 1988, appraisal report for the IM, which reads in part:

> The justification for the recommended policy/procedures for determining rental fees for mini-hydro projects is arrived [sic] from the market place. A careful interpretation of the market reveals that rental charges for these projects are determined by using two approaches addressing separate portions of the total project. Lineal improvements located on public lands, including penstocks, diversion canals and ditches, distribution lines, etc., which lead to and from the power plant are viewed as linear rights-of-ways. Rental charge for linear rights-of-ways, as interpreted from the market for mini-hydros, is based on land value times percentage of fee times a discount rate (same approach as how the BLM's fee schedule is determined).
>
> A power plant and its immediate improvements is considered as a site. In this case, the market reveals that the rental charge for the power plant site is determined by applying the income approach using a percentage of royalty as the basis.

In its response to the petition for reconsideration, BLM states:

> The instant appraisal determination of appropriate rental for the subject right-of-way based on a percentage of project electricity sales is supported by strong market evidence. The rental estimate is based on lease information obtained from agreements negotiated between unrelated parties for similar purposes. About 80% of the market data encountered utilized this method and virtually all of the agreements which covered a significant portion of the project were based on some amount of royalty. This [is] known as selecting appropriate market data, i.e., rental information, for the appraisal problem.

(Response at 2).

Although we accept the relevance of data based on leases rather than sales in this context, neither this response nor the State Appraiser's September 30, 1988, appraisal report provides sufficient support for a 4-percent royalty fee based on gross income from the production of power. The State Appraiser's September 30, 1988, report relates that two companies were contacted and said they paid rental for the linear portions of their hydro projects "on the same basis that the BLM fee schedule is determined." One company said all its penstocks, diversion canals, etc. were treated as and paid as linear rights-of-way and that it paid "a 4% to 5% gross royalty fee on private lands where they construct a power plant." The State Appraiser commented: "This appears to be a practical and sensible approach." The State Appraiser acknowledged that both FERC and the U.S. Forest Service use the BLM fee schedule for all portions of a

mini-hydro project but concluded: "The market * * * clearly shows that a royalty should be charged for power plants on BLM lands. * * * All of our market data points to using the gross 4% royalty on these sites."

The minihydro market survey attached to the appraisal report, however, does not clearly support this conclusion. Eight projects were surveyed. Percentages of gross electric sales paid as rental are listed in ranges for four powerhouses, in combination with either pipelines or penstocks: 2.5-15 percent; 2-3.25 percent; 1.5-15 percent; and 10-25 percent. The company reported in the justification as paying a "4-5-percent gross royalty fee on private lands where they construct a power plant" is listed in the survey as paying $ 310 (presumably per annum) for a powerhouse and penstock "most[ly] on BLM [land] based on formula." No rental for the powerhouse is listed for two projects. The eighth project pays 18 percent for all components, a percentage that increases 1 percent per year for the first 12 years, then by 2 percent per year to a maximum of 40 percent. The generator capacity of four of the power plants ranges from 1.5MW to 18MW; the size of the other four is listed as "unknown." The notations in the "remarks" column of the survey indicate a wide variety of financial arrangements, e.g., graduated royalty rates depending on time or income levels (which account for the royalty ranges listed above) or cash or non-cash up-front payments in addition to royalty; associated water rights or easements; location on public or private land; and other factors whose relationship to the rental for the powerhouses is not explained. In sum, the analysis in the appraisal report is inadequate to support the conclusion that "all of [the] market data points to using the gross 4% royalty on these sites." See Communications Enterprises, Inc., 105 IBLA 132, 135 (1988). 2/ In any event, a market survey based on the premise that linear and site components of a right-of-way should be assessed separately does not conform with the current BLM Manual provisions that one method of rental determination is appropriate for each right-of-way grant, depending on its principal purpose.

[1] BLM's response to the petition for reconsideration reports that the Idaho State Office "was given the lead in establishing appraisal procedures for rental determination for mini hydro rights-of-way. As of this writing [June 18, 1992], these procedures have yet to be finalized and there is, at present, no formal Bureau policy for appraising such grants" (Response at 2). 43 CFR 4.403 provides that we may reconsider a decision in extraordinary circumstances for sufficient reason. We are persuaded there is sufficient reason in this case. We do not agree that BLM committed itself to accept a reciprocal right-of-way from the grantee and waive the rental for the right-of-way it granted to Bear Creek. See 43 CFR 2801.1-2. However, under the circumstances related above we think it appropriate to set aside BLM's February 21, 1989, decision and remand this case for a rental determination based on 43 CFR 2803.1-2(c)(3)(i), i.e., on either a market survey of comparable rentals 3/ or on a value determination

2/ The minimum requirements and applicable standards for the preparation of appraisal reports are set forth in BLM Manual § 9310.2.

3/ We have stated:

"Generally, the preferred method for appraising the fair market rental value for non-linear rights-of-way is the comparable lease method of

for specific parcels or groups of parcels 4/ in accordance with the policy and procedures being developed by BLM. See Northwest Pipeline Corp., 77 IBLA 46 (1983).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we set aside BLM's February 21, 1989, decision, set aside our decision affirming it, and remand the matter for an adjustment of the rental rate consistent with this opinion.

Will A. Irwin
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

fn. 3 (continued)
appraisal where there is sufficient comparable rental data. Colorado Interstate Gas Co., 110 IBLA 171, 175 (1989); Mallon Oil Co., [104 IBLA 145 (1988)] at 151. * * * [A] market survey is specifically authorized by 43 CFR 2803.1-2(c)(3)(i) * * *. As we stated in Colorado Interstate Gas Co., supra at 175-76, '[s]uch an approach is in essence the comparable lease method of appraisal where the fair market rental value of a right-of-way is derived from a review of the rentals charged for comparable leases, adjusting for any differences between the subject right-of-way and the selected comparable leases.'" Laguna Gatuna, Inc., 121 IBLA 302, 306-07 (1991).

4/ The BLM Manual provides:

"Rentals for nonlinear rights-of-way are determined individually based upon a formal recommendation from the Chief State Appraiser or his delegate. (Note the requirements in 43 CFR 2803.1-2(c)(3).) The authorized officer shall provide the appraiser the following specific information:

"(1) Type of right-of-way.

"(2) Location, size, shape, etc. of right-of-way.

"(3) Specific rights to be granted and any criteria or limitations on the grant or permit.

"(4) The term and date for which the valuation is sought.

"(5) Any other information thought to affect the value of the rights to be granted." BLM Manual § 2801.41 E. 3. d. The reference to the requirements of 43 CFR 2803.1-2(c)(3) is to the provision that "[a]ll such rental determinations shall be prepared to the standards and format described in the Uniform Appraisal Standards for Federal Land Acquisition (Department of Justice publication) and/or in certain cases as required by the Bureau's Appraisal manual (9300)." See note 1, supra.